United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

OCTOBER TERM, 1907.

512

No. 1821.

WILLIAM W. DUDLEY AND LOUIS T. MICHENER, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF DUDLEY & MICHENER, APPELLANTS,

vs.

ROBERT L. OWEN.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED AUGUST 12, 1907.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1907.

No. 1821.

WILLIAM W. DUDLEY AND LOUIS T. MICHENER, APPELLANTS,

vs.

ROBERT L. OWEN.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 13, 1907.

In the Court of Appeals of the District of Columbia.

No. 1821.

WILLIAM W. DUDLEY ET AL., Appellants,
vs.
ROBERT L. OWEN.

a Supreme Court of the District of Columbia.

No. 48670. At Law.

WILLIAM W. DUDLEY and LOUIS T. MICHENER, Doing Business under the Firm Name and Style of Dudley & Michener, Plaintiffs,

vs.
ROBERT L. OWEN, Defendant.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:—

1 *Declaration, &c.*

Filed July 14, 1906.

In the Supreme Court of the District of Columbia.

No. 48670. At Law, Docket No. —.

WILLIAM W. DUDLEY and LOUIS T. MICHENER, Doing Business under the Firm Name and Style of Dudley & Michener, Plaintiffs,

vs.
ROBERT L. OWEN, Defendant.

The plaintiffs sue the defendant for money payable by the defendant to the plaintiffs for goods bargained and sold by the plaintiffs to the defendant; and for goods sold and delivered by the plaintiffs to the defendant; and for work done and materials provided by the plaintiffs for the defendant, at his request; and for money lent by

the plaintiffs to the defendant; and for money paid by the plaintiffs for the defendant at his request; and for money received by the defendant for use of the plaintiffs; and for money found to be due from the defendant to the plaintiffs on accounts stated between them.

And the plaintiffs claim $10,000.00 with interest at the rate of 6 per cent. per annum from the 14th day of July 1906.

Second Count.

And the said Plaintiffs by their said Attorneys for a second
2 count to their said declaration, sue the said Robert L. Owen, for money payable by the said Robert L. Owen, to the Plaintiffs, for that heretofore to wit, on or about the 28th day of May A. D. 1902, the said Robert L. Owen and the said Plaintiffs by their contract under seal duly delivered and executed did promise and agree in words and figures following, to wit:

"This memorandum of agreement witnesseth: That John Vaile, Esq., of Fort Smith, Ark., having been employed by the Eastern Cherokee Council of the Cherokee Nation, Indian Territory, under contract of Feb. and April, 1900, and ratified a third time by Act of Council of Sept. 4, 1901;

And whereas, the said John Vaile has employed the services of Robert L. Owen of Muscoga, Indian Territory, under his aforesaid contract;

Now therefore, the premises considered, the said Owen hereby contracts and agrees to convey to W. W. Dudley and L. T. Michener, partners of the firm of Dudley & Michener, the sum of ten thousand dollars ($10,000) out of the fee so placed to the said Owen, immediately upon the collection, or in the exact proportion as the said fees may be collected, it being understood and agreed that this contract is conditioned upon the collection of the fees aforesaid. And in the contingency of the fees not being provided for by legislation, as per the contract of the Eastern Cherokee Council aforesaid,
but upon proof of services, then, and in that event, each of
3 the parties hereto shall prove service independently of the other, and said Owen shall not be expected out of fees collected for his personal service, to pay the fees to the said Dudley & Michener, but it is understood and agreed that he will in such a contingency, do what he can to assist Dudley & Michener to collect the fee hereby contracted by them.

The said Dudley and Michener on their part agree to give their co-operation in the collection of the money due the Eastern Cherokees and to assist the said Owen as associate Counsel in this case.

Witness our hands and seals in duplicate on this 28th day of May, 1902.

(Signed) ROBERT L. OWEN. [SEAL.]
(Signed) DUDLEY & MICHENER. [SEAL.]"

And the Plaintiffs in fact say that, although they have faithfully kept, done, and performed each and everything by said writing on their part agreed to be kept, done and performed and although the said Robert L. Owen hath collected all the fees in said contract to be collected, the said Robert L. Owen hath failed hitherto and still doth fail to keep, carry out and perform the agreement on his part so to be kept, carried out and performed and especially and particularly hitherto hath failed to convey and pay to the Plaintiffs the said sum of ten thousand dollars ($10,000) to the great damage and injury of the Plaintiffs, wherefore they bring this suit and claim $10,000 with interest from this date, besides costs.

SAM'L A. PUTMAN,
CHAS. POE,
Attorneys for Plaintiffs.

4 The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof: otherwise judgment.

SAM'L A. PUTMAN,
CHAS. POE,
Attorneys for Plaintiff-.

Affidavit.

DISTRICT OF COLUMBIA, *To wit:*

William W. Dudley swears that he is one of the plaintiffs named in the declaration to which this affidavit is attached; that the plaintiffs' cause of action therein is based upon a contract under seal made and executed on May 28, 1902, by the plaintiffs and the defendant a true copy of which is hereto annexed and made a part hereof and that the plaintiffs have done everything on their part agreed to be done by the terms of said contract; that the defendant has collected the money mentioned in said contract in full as set forth, but hath failed to pay or convey to the plaintiffs the said sum of ten thousand dollars as the defendant agreed by the terms of said contract to pay and convey and that the sum of $10000.00 with interest, from this date as therein claimed, is justly due and owing to the plaintiffs from the defendant by reason of the premises, exclusive of all set-offs and just grounds of defense.

WILLIAM W. DUDLEY.

Subscribed and sworn to before me this 14th day of July, 1906.

[SEAL.]

M. S. W. DAY,
Notary Public.

5 *Defendant's Plea.*

Filed October 1, 1906.

In the Supreme Court of the District of Columbia, the First Day of October, 1906.

No. 48670. At Law.

WILLIAM W. DUDLEY and LOUIS T. MICHENER, Doing Business under the Firm Name and Style of Dudley & Michener, Plaintiffs,
vs.
ROBERT L. OWEN, Defendant.

I. The defendant, for plea to the first count of the declaration, says that he did not promise in manner and form as therein alleged.

II. The defendant, for plea to the second count of the declaration, says that he did not promise in manner and form as therein alleged.

* * * * * * *

WM. H. ROBESON,
Attorney for Defendant.

Joinder of Issue.

Filed October 12, 1906.

In the Supreme Court of the District of Columbia.

No. 48670. At Law.

WILLIAM W. DUDLEY ET AL., Plaintiffs,
vs.
ROBERT L. OWEN, Defendant.

6 The plaintiffs hereby join issue with the defendant upon his plea to the first count of plaintiffs' declaration and upon his second plea to the second count of plaintiffs' declaration.

SAM'L A. PUTMAN,
CHAS. POE,
Attorneys for Plaintiffs.

Stipulation for Trial by the Court Without a Jury.

Filed May 22, 1907.

In the Supreme Court of the District of Columbia.

No. 48670. At Law.

WILLIAM W. DUDLEY ET AL., Plaintiffs,
vs.
ROBERT L. OWEN, Defendant.

It is hereby agreed by the parties to this suit that the issues of fact may be tried and determined by the court without the intervention of a jury and a jury in said trial is hereby waived, according to the terms and provisions of Sections 70 and 71 of the Code of the District of Columbia.

SAM'L A. PUTMAN,
CHAS. POE,
Attorneys for the Plaintiffs.
WM. H. ROBESON,
Attorney for the Defendant.

7 Supreme Court of the District of Columbia.

MONDAY, *July* 8, 1907.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

At Law. No. 48670.

WILLIAM W. DUDLEY and LOUIS T. MICHENER, Doing Business under the Firm Name and Style of Dudley and Michener, Pl't'fs,
vs.
ROBERT L. OWEN, Def't.

Now again come here the parties aforesaid, in manner aforesaid: whereupon this cause having heretofore been heard by the Court, the Court finds the matters of difference between the parties in favor of the defendant.

Therefore it is considered that the plaintiffs take nothing by their suit, and that the defendant go thereof without day, and recover against the plaintiffs the costs of his defense, to be taxed by the Clerk and have execution thereof.

The plaintiffs note an appeal to the Court of Appeals of the District of Columbia, and upon motion, the penalty of the bond for costs upon said appeal is hereby fixed in the sum of one hundred dollars ($100).

8 *Memoranda.*

July 12, 1907.—Bill of exceptions submitted to court.
July 12, 1907.—Appeal bond filed.

Supreme Court of the District of Columbia.

SATURDAY, *July* 20, 1907.

Session resumed pursuant to adjournment, Mr. Justice Anderson presiding.

* * * * * * *

By Justice Wright.

At Law. No. 48670.

WILLIAM W. DUDLEY ET AL., Pl't'fs,
vs.
ROBERT L. OWEN, Def't.

Now come here the plaintiffs by their Attorneys and pray the Court to sign, seal and make part of the record, their bill of exceptions taken during the trial of this cause (heretofore submitted) now for then, which is accordingly done.

9 *Bill of Exceptions.*

Filed July 20, 1907.

In the Supreme Court of the District of Columbia.

No. 48670. At Law.

WILLIAM W. DUDLEY ET AL., Plaintiffs,
vs.
ROBERT L. OWEN, Defendant.

At the trial of this cause before Mr. Justice Wright without a jury, after the offer of testimony on behalf of the plaintiffs and defendant, the Court, at the request of the plaintiffs, found the following facts to have been proven:

On May 28, 1902, the plaintiffs and the defendant entered into the following contract:

This memorandum of agreement witnesses that John Vaile, Esquire, of Fort Smith, Arkansas, having been employed by the Eastern Cherokee Council of the Cherokee Nation, Indian Territory, under contract of February and April, 1900, and ratified a third time by act of Council of September 4th, 1901;

And whereas, the said John Vaile has employed the services of

Robert L. Owen, of Muscoga, Indian Territory, under his aforesaid contracts:

Now therefore, the premises considered, the said Owen hereby contracts and agrees to convey to W. W. Dudley and L. T.
10 Michener, partners, of the firm of Dudley & Michener, the sum of Ten Thousand Dollars ($10,000.00), out of the fees so pledged to the said Owen immediately upon the collection, or in the exact proportion as the said fees may be collected, it being understood and agreed that this contract is conditioned upon the collection of the fees aforesaid. And in the contingency of the said fees not being provided for by legislation, as per the contract of the Eastern Cherokee Council aforesaid, but upon proof of services, then and in that event, each of the parties hereto shall prove service independently of the other, and said Owen shall not be expected out of fees collected for his personal service, to pay the fee to said Dudley & Michener, but it is understood and agreed that he will in such a contingency do what he can to assist Dudley & Michener to collect the fee hereby contracted by them.

The said Dudley & Michener on their part agree to give their co-operation in the collection of the money due the Eastern Cherokees and to assist the said Owen as associate counsel in this case.

Witness our hands and seals in duplicate on this twenty-eighth day of May, 1902.

ROBERT L. OWEN. [SEAL.]
DUDLEY & MICHENER. [SEAL.]

Thereafter the plaintiffs, on their part, gave to the defendant their co-operation, assistance and services in the prosecution and
11 collection of the claim referred to in said contract, as said contract provided they should do.

On March 20, 1905, the Court of Claims rendered a judgment in the case of the Eastern Cherokees against the United States. On April 17, 1905, the defendant, Owen, addressed the following letter to the plaintiffs:

"THE SOUTHERN,
ST. LOUIS, *April* 17, 1905.

Dudley & Michener, Washington, D. C.

GENTLEMEN: I expect to be at Riggs House about April 28th, 1905, and wish by that time you would make up a careful affidavit of services rendered in case under contract of May 28/02, as I am preparing decree and wish to protect your fee.

Yours truly, R. L. OWEN."

A few days thereafter, the plaintiff, Michener, met the defendant, and was told by him that he had abandoned the purpose to make application for fees at that time and would postpone said application until after the Supreme Court of the United States, to which the said case was to be appealed, had acted thereon, and the application was so postponed by the defendant Owen. The judgment of the Court of Claims was affirmed by the Supreme Court, with a slight modification. After the return of the mandate of the Su-

preme Court to the Court of Claims, the defendant, Owen,
12 who was one of the attorneys of record in the case in the Court of Claims, together with his co-attorney of record, R. V. Belt, made an application to the Court of Claims for the allowance of 15 per cent. of the judgment to them as their fee. By agreement between the said Owen and Belt and certain of their associate attorneys, other than the plaintiffs, and without notice from defendant to the plaintiffs, the Court apportioned the fee of 15 per cent. among said Owen and Belt and those associate attorneys, in accordance with their several contracts.

Under the rules of the Court of Claims the attorneys of record had absolute control of the distribution of the fee allowed by the Court, and the Court, not recognizing any associate counsel, save as directed by the attorneys of record, the plaintiffs could not, under the rules of the Court, have claimed any fee except by permission of the said attorneys of record.

Under said decree the defendant, Owen, was allowed and was paid the full amount of fees contemplated to be received by him according to the terms of the said contract between him and Dudley & Michener.

The plaintiffs were not parties to the said agreement between Owen and Belt, as attorneys of record, and said associate counsel, and had no further notice from Owen that any application was to be made to the Court to apportion fees to any counsel except attorneys of record, nor were they ever further notified by the defendant to prepare and render proof of their services after the interview between the plaintiff Michener and the defendant, in April, 1905.

The defendant has never paid to the plaintiffs any sum on
13 account of the said contract between him and plaintiffs.

Whereupon the plaintiffs prayed the Court to find the following conclusions of law:

The plaintiffs request the Court to find as a matter of law that under the pleadings and evidence in this case, it was not incumbent upon the plaintiffs to make proof of services in the Court of Claims to entitle them to recover.

The plaintiffs request the Court to render a judgment in favor of them on the pleadings and all the evidence in the cause, for the sum of Ten Thousand Dollars ($10,000.00), with interest from July 14, 1906.

Which conclusion of law the Court refused to find; to which action of the Court in refusing to find each of said conclusions of law the plaintiffs then and there excepted, and the judgment of the Court being against the plaintiffs, and in favor of the defendant, the plaintiffs have prayed an appeal to the Court of Appeals of the District of Columbia, which hath been allowed, and in order that the matters and things in their Bill of Exceptions which otherwise would not appear of record, may be so made to appear and that it may be known that the above findings are all the facts in this cause, said plaintiffs prayed the Court to sign this their Bill of Exceptions, which is accordingly done and made of record, this 20th day of July, A. D. 1907, now for then.

DAN THEW WRIGHT, *Justice.* [SEAL.]

14 *Instructions for Preparation of Record on Appeal.*

Filed July 20, 1907.

At Law. No. 48670.

W. W. DUDLEY ET AL.
vs.
R. L. OWEN.

John R. Young, Esquire, Clerk, &c., &c.

SIR: In making up the Record on Appeal to the Court of Appeals of the District of Columbia you will include the following papers, The Declaration—The pleas to which the demurrer was not interposed—The replication—The stipulation for trial by the Court—Bill of Exceptions—The judgment—The prayer for appeal and order allowing the same and the memorandum as to filing of approved appeal bond—

SAM'L A. PUTMAN,
CHAS. POE,
Att'ys for Pl't'fs.

15 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 14, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 48670 at law, wherein William W. Dudley, *et al.* are Plaintiffs and Robert L. Owen is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 7th day of August, A. D. 1907.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk,*
By ALF. G. BUHRMAN,
Ass't Clerk.

Endorsed on cover: District of Columbia supreme court. No. 1821. William W. Dudley *et al.*, appellants, *vs.* Robert L. Owen. Court of Appeals, District of Columbia. Filed Aug. 12, 1907. Henry W. Hodges, clerk.

In the Court of Appeals of the District of Columbia.

OCTOBER TERM, 1907.

WILLIAM W. DUDLEY AND LOUIS T. MICHENER, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF DUDLEY & MICHENER,
Appellants,

vs.

ROBERT L. OWEN.

No. 1821.

APPELLANTS' BRIEF.

SAM'L A. PUTMAN,
CHAS. POE.
Attorneys for Appellants.

J. D. MILANS & SONS, LAW PRINTERS, 615 E STREET, NORTHWEST, WASHINGTON, D. C.

In the Court of Appeals of the District of Columbia.

OCTOBER TERM, 1907.

NO. 1821.

WILLIAM W. DUDLEY AND LOUIS T. MICHENER,

DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF

DUDLEY & MICHENER, APPELLANTS,

VS.

ROBERT L. OWEN.

APPELLANTS' BRIEF.

I.

Statement.

On the 14th of July, 1906, the plaintiffs brought their suit in the Supreme Court of the District of Columbia against the defendant to recover the sum of $10,000.00, together with interest thereon from that date, besides costs. The declaration contains the usual money counts and a special count in debt, in which the contract upon which they base their claim together with the allegation

of its breach by the defendant, and the performance of all its terms by the plaintiffs, are fully set forth.

The general issue plea was filed to each of these counts and the issue was thus made up. (Record, pp. 1–4.)

By stipulation of counsel the case was heard by Mr. Justice Wright without a jury, in accordance with the provisions of Sections 70 and 71 of the Code of the District of Columbia, and at the hearing before him at the conclusion of the testimony on both sides the plaintiffs tendered to him requests for findings of fact and conclusions of law. (Record, pp. 6, 7, 8.)

The requests for findings of fact the court granted, but refused those for the conclusions of law based thereon, and entered a judgment in favor of the defendant.

It is from this judgment that the present appeal is taken.

As the bill of exceptions in this case shows that the requests for findings of fact made by the plaintiffs and granted by the court contained all the facts proven in the case, the action of the court in entering a judgment for the defendant thereon amounts to the sustaining of a demurrer by the court to all the evidence in the cause. The conclusions of law which the court refused to give were, in effect, a prayer by the plaintiffs for the court to sign judgment in their favor.

We confess that we have a reasonable curiosity to know how the court reconciled its action in finding the facts in favor of the plaintiffs with that of giving judgment in favor of the defendant; and how it was possible for the court to refuse to say, as matter of law, that under these facts, so found to be the only facts, it was not necessary for the plaintiffs to prove services.

II.

Assignments of Error.

First. The court below erred in refusing to find the conclusions of law as requested by the appellants.

Second. The court below erred in refusing to enter its judgment in favor of the appellants upon the facts found by the court to be the only facts proven in the case.

Third. The court below erred in finding its judgment in favor of the appellee.

III.

Argument.

The contract sued upon is in the following language:

> THIS MEMORANDUM OF AGREEMENT WITNESSES that John Vaile, Esquire, of Forth Smith, Arkansas, having been employed by the Eastern Cherokee Council of the Cherokee Nation, Indian Territory, under contract of February and April, 1900, and ratified a third time by act of Council of September 4th, 1901;
>
> AND WHEREAS, the said John Vaile has employed the services of Robert L. Owen, of Muscoga, Indian Territory, under his aforesaid contracts;
>
> NOW THEREFORE, the premises considered, the said Owen hereby contracts and agrees to convey to W. W. Dudley and L. T. Michener, partners, of the firm of Dudley & Michener, the sum of Ten Thousand Dollars ($10,000), out of the fees so pledged to the said Owen immediately upon the collection, or in the exact proportion as the said fees may be collected, it being understood and

agreed that this contract is conditioned upon the collection of the fees aforesaid. And in the contingency of the said fees not being provided for by legislation, as per the contract of the Eastern Cherokee Council aforesaid, but upon proof of services, then, and in that event, each of the parties hereto shall prove service independently of the other, and said Owen shall not be expected out of fees collected for his personal service, to pay the fee to said Dudley & Michener, but it is understood and agreed that he will in such a contingency do what he can to assist Dudley & Michener to collect the fee hereby contracted by them.

The said Dudley & Michener on their part agree to give their co-operation in the collection of the money due the Eastern Cherokees and to assist the said Owen as associate counsel in this case.

WITNESS our hands and seals in duplicate on this twenty-eighth day of May, 1902.

ROBERT L. OWEN, [SEAL]
DUDLEY & MICHENER. [SEAL]

This contract provides that appellants shall, for a stated compensation, assist the appellee in the prosecution of a claim of the Eastern Cherokees against the United States. The lower court finds as a matter of fact that appellants performed all the service for appellee required of them by the contract (Rec., p. 7). The burden is therefore upon the appellee to show some reason why he should not pay them the sum of $10,000.00 provided by the contract to be paid them.

The reason given by him in the court below was that appellants had failed to make "proof of their services" as provided by the contract.

Proof of Services.

Your Honors will observe that the contract between appellants and appellee is based upon a contract between the appellee and a man named John Vaile, and that contract is in turn based upon one between Vaile and the Eastern Cherokees.

It was under this last contract that the fee was to be paid by the Indians. It must therefore be presumed that the "proof of services" referred to in the contract between appellants and appellee, was proof of services under the contract between Vaile and the Indians and in compliance with the law as it stood when appellants and appellee made their contract.

On the 28th of May, 1902 (the date of this contract) the only law relating to the compensation of attorneys for services rendered to Indians was Section 2104 of the Revised Statutes, which provides as follows:

> * * * and no money or thing shall be paid to any person for services under such contract or agreement, until such person shall have first filed with the Commissioner of Indian Affairs a sworn statement, showing each particular act of service under the contract, giving date and fact in detail, and the Secretary of Interior and Commissioner of Indian Affairs shall determine therefrom whether, in their judgment, such contract or agreement has been complied with or fulfilled; if so, the same may be paid, and, if not, it shall be paid in proportion to the services rendered under the contract.

It will be perceived that Section 2104 provides for a proportionate reduction by the Secretary of the Interior

or the Commissioner of Indian Affairs from the amount named in a contract between the Indians and their attorneys, at the same time that it provides for the rendering of strict, itemized proof of service.

In this state of the law and with the Vaile contract before them appellants and appellee contracted thus:

> And in the contingency of the fees not being provided for by legislation, as per the contract with the Eastern Cherokee Council aforesaid, but upon proof of services, then, and in that event, each of the parties hereto shall prove service independently of the other, and said Owen shall not be expected out of fees collected for his personal service to pay the fees to said Dudley & Michener, but it is understood and agreed that he will, in such a contingency, do what he can to assist Dudley & Michener to collect the fee hereby contracted to them.

This language shows beyond question that the "proof of services", contemplated by the parties, was proof to the Secretary of the Interior under the provisions of Section 2104 R. S., and that this was contemplated only as a possible contingency, it being then the purpose of Owen to secure from Congress legislation which would take the matter from out the jurisdiction and control of the Secretary. As we will hereafter show, this legislation was secured, and no application was ever made to the Secretary for the allowance and payment of fees, and of course no "proof of services" was offered to him by anyone. The contingency contemplated by the parties to the contract not having arisen, of course the entire proviso relative to "proof of services" is as dead as if it had never been a part of the contract.

This Fee was Provided for by Legislation.

Within a few weeks after Dudley & Michener and Owen made their contract, to-wit, on the first day of July, 1902 (32 Stat. L., sec. 68, p. 726), Congress invested the Court of Claims with jurisdiction to hear and determine the controversy between the United States and the Cherokee Nation, or any band thereof, providing in that section that the payment of fees to counsel should be under the supervision of the Secretary of the Interior, in accordance with Section 2104 of the Revised Statutes, which we have above quoted. This was not satisfactory to Owen and he induced Congress to pass the Act of March 3, A. D. 1903 (32 Stat. L., p. 996), construing Section 68 of the Act of July 1, 1902, and conferring upon the Court of Claims the right to fix the compensation of the attorneys of the Eastern Cherokees.

It was under this last mentioned Act that Owen was allowed his fees by the Court of Claims. It is needless to say that two acts of Congress constitute "legislation." The fears entertained by Owen that his contract fee would or could be scaled down by the Secretary of the Interior were thus dispelled by legislation, and the fears of the necessity for an itemized account, subjected to his scrutiny, also had vanished.

The fee paid Owen was not paid him upon proof of services. It was paid him in the language of the finding of fact (Record, bottom of page 7, et seq.):

> After the return of the mandate of the Supreme Court to the Court of Claims, the defendant, Owen, who was one of the attorneys of record in the case in the Court of Claims, together with his co-attorney of record, R. V. Belt, made an appli-

cation to the Court of Claims for the allowance of fifteen per cent. of the judgment to them as their fee.

There is not a word in the record to show that any proof of services was made to the Court of Claims.

The court was fully aware of the untiring zeal, skill, fidelity and intelligence of Mr. Owen and his associates and required no proof of service, and it is for this reason that the court in its findings says that the fees were allowed upon "application" of Owen.

In this connection it is well to remember that it is found as a proven fact in this case that Owen, the appellee, received every dollar contemplated to be received by him when he and the appellants entered into the contract sued on in this case. His fee was not reduced one penny, and therefore he is not called upon to pay Dudley & Michener out of something which he did not receive.

So far as this record discloses, no one was required to make any proof of service to anybody. Owen "*made application*" to the Court of Claims for the allowance of his fee and, as is further found in the findings of fact, on page 8 of the Record, the full amount contemplated by his contract with John Vaile, as well as by his contract with Dudley & Michener, was allowed and paid to him without any deduction.

Waiver of Proof of Service.

If it should be contended that the contract does provide for and require proof of service, before the Court of Claims, by the appellants, Owen waived the necessity for such proof.

On April 17th, 1905, Owen wrote the appellants the following letter:

THE SOUTHERN.
ST. LOUIS, *April 17, 1905.*

DUDLEY & MICHENER,
Washington, D. C.

Gentlemen : I expect to be at Riggs House about April 28th, 1905, and wish by that time you would make up a careful affidavit of services rendered in case under contract of May 28, '02, as I am preparing decree and wish to protect your fee.

Yours truly,
R. L. OWEN.

A few days thereafter, the appellant Michener met the appellee and was told by him that he had abandoned the purpose to make application for fees at that time and would postpone said application until after the Supreme Court of the United States, to which the case was to be appealed, had acted thereon, and the application was so postponed by the appellee (Findings of Fact, Record, p. 7).

By agreement between Owen and several of his associates, other than the appellants, and without notice from Owen to the appellants, the court apportioned the fee of fifteen per cent. among Owen and those associate attorneys (Record, p. 8).

To hold that such conduct does not amount to a waiver is to permit one party to a contract to deceive the other, lull him into a sense of security and then defraud him.

We therefore respectfully submit that Your Honors should reverse the judgment of the court below and enter a judgment in favor of the appellant for ten thousand dollars, with interest from July 14, 1906, besides costs.

SAM'L A. PUTMAN,
CHAS. POE,
Attorneys for Appellants.

IN THE

Court of Appeals, District of Columbia

OCTOBER TERM, 1907.

NO. 1821.

WILLIAM W. DUDLEY and LOUIS T. MICHENER, doing business under the firm name of DUDLEY & MICHENER, Appellants,

vs.

ROBERT L. OWEN.

BRIEF FOR APPELLEE.

WILLIAM H. ROBESON,
Attorney for Appellee.

McGILL & WALLACE, Law Printers, Washington, D. C.

IN THE

Court of Appeals, District of Columbia

OCTOBER TERM, 1907.

WILLIAM W. DUDLEY AND LOUIS T. MICHENER, doing business under the firm name of DUDLEY & MICHENER, *Appellants*,

vs.

ROBERT L. OWEN.

No. 1821.

BRIEF FOR APPELLEE.

The statement on pages one and two of the appellants' brief, in so far as it presents the pleadings and judgment of the court below, is correct and need not be repeated here.

The three assignments of error constitute in fact but one, namely, that on the findings of fact judgment should have been awarded to plaintiffs; and that is the sole question for consideration.

ARGUMENT.

I.

The Contract.

Appellants and defendant entered into a certain contract fully set out in the findings (Rec., pp. 6, 7), reciting—

1. That one John Vaile had entered into a certain contract with the Eastern Cherokee Council of the Cherokee Nation; and—

2. That the said Vaile had employed the defendant, Robert L. Owen, under the said contract.

Following these recitals the language establishes an agreement that the said Owen will convey to Dudley & Michener, appellants, ten thousand dollars out of the fees pledged to Owen by Vaile,—

> immediately upon the collection, or in the exact proportion as the said fees may be collected, it being understood and agreed that this contract is conditioned upon the collection of the fees aforesaid.

The meaning of these words is, plainly, that if Owen did not collect his fee from Vaile, he would owe Dudley & Michener nothing; if he collected a smaller fee from Vaile than had been contracted to him, Dudley & Michener would suffer a like deduction. Upon this point there can be no dispute.

But the next paragraph of the contract contains several very important provisions, as follows:

> *And in the contingency of the fees not being provided for by legislation,* as per the contract of the Eastern Cherokee Council (with John Vaile), *but upon proof of services*—then, and in that event, *each of the parties hereto shall prove service independently of the other, and said Owen shall not be expected out of the fees collected for his personal service to pay the fees to the said Dudley & Michener.*

The fees were not provided by legislation, but Owen and his co-attorney of record, R. V. Belt, made application to the Court of Claims for the allowance of fees (Rec., p. 8).

The court allowed them a fee of fifteen per cent., which was apportioned to Owen and Belt and to other attorneys with whom they had made contracts, and to Mrs. Belva A. Lock

This statement establishes that the fee not having been provided for by legislation—

1. It was the duty of appellants to make proof of service.

2. No part of Owen's fee, allowed by the Court of Claims, was to be taken to pay any fee to Dudley & Michener.

II.

The Duty of Appellants to Prove Service.

Appellants have no right to assume that the allowance of the fee by the Court of Claims was under the authority of the contract between Vaile and the Indians, "as it stood when appellants and appellee made their contract."

To the contrary it was not allowed under the authority of that contract, but in accordance with the direction of a special statute, as will be shown.

The citation in appellants' brief of Section 2104 R. S. is, in this respect, a confession of weakness, for the section referred to had no more connection with the allowance of the fee to Owen and his associates than the law affecting lotteries or any subject foreign to our consideration.

It is not pretended that the Secretary of the Interior, or the Commissioner of Indian Affairs had the slightest thing to do with the execution of the Vaile contract.

The section cited is one of several sections having application to contracts with Indians generally, to be made under certain conditions of execution, and to be approved, disapproved, or modified by the Secretary of the Interior. This fee was allowed to Owen and his associates, not under Section 2104, but in accordance with a statute, the pertinent portion of which is in this language:

> "That the prosecution of such suit on the part of the Eastern Cherokees shall be through attorneys employed by their proper authorities, their compensation for expenses and services rendered in relation to such claim to be fixed by the Court of Claims upon the termination of this suit." (32 Stat. L., p. 996.)

Insert I

The Eastern Cherokees were made citizens of the United States by the act of March 3, 1901, (31 Stat. L. 1447), and were not subject to the provisions of the sections referred to in the making of their contract with Vaile.

But, passing that by, did the appellant make proof of service before the Secretary of the Interior? If their counsel's suggestion is to be followed, was it not material for them to show that they had done so?

And, further, did not appellant know that it was their duty to make proof of service before the Court of Claims?

The law so provided. Every man is presumed to know the law. The presumption has greater force in this than an average case, since the appellants are lawyers.

More than this, the appellants *knew* that proof of service was to be made before the Court of Claims, as is shown in the finding setting out Owen's letter to appellants, and showing that, soon after that letter was written, Owen advised one member of appellant firm that the application for fees would not be made until after the case had been decided by the Supreme Court, to which an appeal had been taken (R., p. 7).

Appellants suggest that the record does not show that Owen himself made any proof of service. I apprehend that no court will assume that another court rendered a judgment *without proof*. There is sometimes ground to complain of courts that they do not render judgment upon proof; but this is a novel accusation against a court, which will hardly be sustained upon the mere suggestion of counsel. But what of it? Appellants had to make proof whether Owen did or not. They might have shown service (if they rendered any) which would have increased the fee allowed. Or, if the Court of Claims committed the terrible mistake of rendering a judgment against Indians for a large amount, without proof of ser-

vice rendered them, that judgment might have been augmented by the mere mention of the connection of the influential appellants with the case.

III.

Defendant's Fees Not to be Diminished.

But the court below had another reason for denying plaintiffs judgment on the facts, than their failure to prove service; for no matter how much the value of their services (if they performed any) *no part of Owen's fee was to be taken for their compensation*.

Such is the plain provision of the contract. If appellants had presented to the court proof of their services, they would have been bound to state that whatever was allowed to them must *be in addition to the fee allowed Owen* and his associates. It was not to be deducted from Owen's part of the fee, since they had so agreed. Can anything be plainer?

IV.

Proof of Service Not Waived.

Appellants say that Owen waived the necessity for such proof. This alleged waiver is based upon Owen's failure to give appellants notice that he was going to make application for a fee (as the law directed), and make proof of service (as the law required). This assumes that Owen was compelled to give notice to appellants. What compelled him? Not his contract, certainly. Certainly not the law itself. Was there an

implied contract that he should give appellants any notice? Had he not advised them by his letter of April 17, 1905 (Rec., 7), that application for fees would not be made until the Supreme Court had decided the case, and therefore that when the Supreme Court awarded a favorable judgment the application would be made? Had not the Supreme Court decided it? Had appellants the right to sit supinely by, after this important case had been decided by the Supreme Court, the amount of its judgment appropriated for, application for fees filed, proof of services made, judgment awarded and the amount collected, then to come and say that because no notice was given them by Owen they were excused from compliance with the plain terms of their contract? And that they can now claim a fee to be deducted from that allowed to Owen—a condition against which the contract had specially provided?

If appellants actually performed any services, being chargeable with notice that the fees were not provided for by legislation, but were to be established by proof, being under contract to make proof, being under obligation, whether they did, or did not make proof, to claim nothing out of Owen's fee, it was the utmost laches to await a formal notice from Owen to make proof.

And finally, chargeable with all this notice, cognizant of all these facts, what is to be said of their failure to avail themselves of Owen's last promise in their contract:

> * * * but it is understood and agreed that he (Owen) will, in such a contingency, do what he can

to assist Dudley & Michener to collect the fee hereby contracted by them.

It would be equally as wise and luminous a suggestion as others offered by appellants' counsel to interpret this as meaning that it was Owen's duty to compel the appellants, even by force, to go with him to the Court of Claims, and there, himself, to perform prodigies of professional valor, to the end that they might receive for their services this considerable compensation which they would not themselves demand, but now seek to obtain.

The judgment of the court below was right. It could not have been otherwise, in the absence of facts which the court did not and could not find.

WILLIAM H. ROBESON,
Attorney for Appellee.